

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

AMENDMENT TO 312 IAC 9-10-3,)	Administrative Cause
GOVERNING AQUATIC VEGETATION)	Number 11-064D
CONTROL PERMITS)	
)	(LSA Document #12-109(F))

**REPORT ON RULE PROCESSING, PUBLIC HEARING AND WRITTEN
COMMENTS, AND HEARING OFFICER ANALYSES AND
RECOMMENDATION OF FINAL ADOPTION**

1. REPORT ON RULE PROCESSING

For consideration are proposed amendments to 312 IAC 9-10-3 which governs aquatic vegetation control permits. The amendments would eliminate the requirement to post a sign at the treatment site five days in advance of the treatment. The proposal was initiated by a Petition for Rule Change filed on April 11, 2011 by Tony Cunningham, Aquatic Specialist with Clarke, a global environmental products and services company.

The Commission gave preliminary adoption to the rule amendments on March 20, 2012. As reported in the pertinent portions of the draft March 20, 2012 meeting minutes:

Mark Reiter, Director of Division of Fish and Wildlife, presented this item. Reiter informed that currently, it is required to post aquatic vegetation treatment five days prior to treatment and also it is required to provide the type chemical and any restrictions the chemical may have on it. He stated that the DNR received a petition from a pesticide applicator whose complaint was that "posting" was "burdensome" since a rain event may occur which would call for reposting and therefore would cost the lake homeowner's association more money. Reiter stated that most of the restrictions on aquatic herbicides have been "lifted" since the original rule language. Reiter said that DNR recommends the removal of the 5-day posting requirement for treatment of aquatic vegetation.

R.T. Green moved to adopt the proposed rule change regarding aquatic vegetation control. Robert Wright seconded the motion. Upon a voice vote, the motion carried.

The “Notice of Intent” to adopt the proposed rule amendments was posted to the INDIANA REGISTER at 20120229-IR-312120109NIA on February 29, 2012. The notice identified Linnea Petercheff, Staff Specialist with the Department’s Division of Fish and Wildlife, as the “small business regulatory coordinator” for purposes of Indiana Code § 4-22-2-28.1.

As specified by Executive Order, proposed fiscal analyses of the rule proposal were submitted, along with a copy of the proposed rule language and a copy of the posted Notice of Intent, to the Office of Management and Budget on March 1, 2012. In a letter dated March 22, 2012, Adam M. Horst, Director, Office of Management and Budget, made a favorable finding with respect to the fiscal analyses for the rule proposal.

The Division of Hearings submitted the rule proposal to the Legislative Services Agency, along with the “Statement Concerning Rules Affecting Small Business” (also known as the “Economic Impact Statement”), on March 28, 2012. The Notice of Public Hearing was submitted to the Legislative Services Agency on March 29, 2012. On April 11, the following were posted to the INDIANA REGISTER: the text of the proposed rule at 20120411-IR-312120109PRA; the notice of public hearing along with the justification statement (IC 4-22-2-24(d)(3)) at 20120411-IR-312120109PHA; and the Economic Impact Statement at 20120411-IR-312120109EIA.

Following receipt of LSA’s “Authorization to Proceed” on March 30, the Division of Hearings caused a Notice of Public Hearing to be published in the Indianapolis *Daily Star*, a newspaper of general circulation in Marion County Indiana, on April 3, 2012. In addition, the notice of the public hearing and a summary of the proposed rule changes were published on the Commission’s web-based electronic calendar.

The Statement Concerning Rules Affecting Small Businesses (the “EIS”), as required under IC 4-22-2.1-5, and submitted by the Small Business Regulatory Coordinator, indicates

**IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses
Estimated Number of Small Businesses Subject to this Rule:**

Ten pond management companies.

Estimated Average Annual Reporting, Record Keeping, and Other Administrative Costs Small Businesses Will Incur for Compliance:

This will reduce the current requirement to post a sign at least five days in advance.

Estimated Total Annual Economic Impact on Small Businesses to Comply:

Savings of \$125 per business per year by not having to send an employee to the site of the proposed treatment area and post a sign at least five days in advance. This cost was determined at \$5 for gas x 25 permits per business (25 trips to the treatment site prior to the treatment).

Justification Statement of Requirement or Cost:

Aquatic vegetation control permit holders are already required to post a sign at the treatment site at least five days in advance indicating the substance that will be applied and any precautions that should be taken. This change eliminates the need to post the sign five days in advance. The sign only has to be posted prior to the treatment of the herbicide.

Regulatory Flexibility Analysis of Alternative Methods:

The DNR already requires aquatic vegetation control permit holders to post a sign at the treatment site at least five days in advance indicating the substance that will be applied and any precautions that should be taken. Other options include changing the date requirement for the sign to a number of days less than five or to not post a sign at all. The DNR believes that it is imperative for the public to be notified, at least on the date of application, that a chemical has been applied to the water to kill the aquatic vegetation. Even if it is safe for people and pets, it may change the color of the water and have an odor, as well as create dead vegetation that others may see. Therefore, a sign providing the name of the substance and whether any precautions should be taken are still very important. The DNR does not believe that these alternatives are necessary. The DNR believes that requiring the sign to be posted right before the time of the application of the substance is appropriate and reasonable.

Because the amendments would liberalize existing requirements and reduce costs (particularly when inclement weather or other adverse site conditions require a deferral of treatment and reposting), and would not impose new requirements or costs under IC 4-22-2.1-5(a), the proposal was not submitted to the Indiana Economic Development Corporation for an economic analysis.

2. PUBLIC HEARING AND WRITTEN COMMENTS

The public hearing was held as scheduled on May 3, 2012 in Indianapolis, Indiana. Bill James and Linnea Petercheff appeared from the DNR's Division of Fish and Wildlife. No member of the public attended the hearing. No member of the public submitted written comments.

Legislative services agency identified a technical flaw in existing language. In subsection (b)(1)(C) the phrase "the water depth is six (6) feet or less" is used. LSA reflects that this language "doesn't work" with the introduction in subsection (b)(1): "Aquatic vegetation is controlled in one (1) contiguous area that is:" Although the rule intent seems reasonably clear, LSA's point has validity. The suggestion is the word "where" be added at the beginning of clause (C) as a technical correction.

3. HEARING OFFICER ANALYSES AND RECOMMENDATION REGARDING FINAL ADOPTION

The Petition for Rule Change filed by Tony Cunningham stated in pertinent part:

...

Current Rule: Except as otherwise provided in this subsection, five (5) days before the application of a substance permitted under this section, the permit holder must post clearly visible signs at the treatment area indicating the substance that will be applied and what precautions should be taken.

Proposed Revision: Except as otherwise provided in this subsection, before the application of a substance permitted under this section, the permit holder must post clearly visible signs at the treatment area indicating the substance that will be applied and what precautions should be taken.

There are several concerns regarding the current 5-day rule. The federal law requires the restrictions to be posted while they are in effect. Some restrictions expire in less than 5 days. Weather or other considerations can change the treatment date after the 5-day signs have been posted. The various lake users are confused when signs are posted but no treatment has been performed and likewise when signs are not posted at the time of treatment. Double posting an area is a waste of gas, labor and materials.

The DNR Fisheries Division is aware of this problem and has worked with the aquatics professionals to keep the lake associations, lake users and riparian property owners informed about nuisance aquatic vegetation control methods.

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As anticipated by the Commission's nonrule policy document concerning petitions for rule change, Information Bulletin #7 (20111005-IR-312110580NRA), Stephen Lucas, Director of the Commission's Division of Hearings, on April 12, 2011 forwarded the petition to the DNR's Deputies Director. After considering their recommendations for constituting the committee, the DNR Director formed a reviewing committee consisting of professionals from various DNR divisions. These were Mark Reiter, Chair; and, Members, Megan Abraham; James Hebenstreit, and Col. Scotty Wilson.

The DNR committee recommended approving Cunningham's petition and eliminating the requirement to post signs at the treatment area five days in advance of the treatment. Posting signs on site before treatment remains a requirement. Retention of this requirement is justified to promote public understanding of site conditions if a treatment is occurring or has recently occurred. The hearing officer concurs with the petitioner and with the recommendations of the DNR review committee that the five-day advance posting requirement should be eliminated.

The hearing officer recommends that the five-day advance posting requirement be stricken. As a technical correction in response to a suggestion by the Legislative Services Agency, the hearing officer also recommends adding the word “where” at the beginning of subsection (b)(1)(C).

Dated: May 3, 2012

Stephen L. Lucas
Hearing Officer

EXHIBIT A

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule

LSA Document #12-109(F)

DIGEST

Amends 312 IAC 9-10-3 governing aquatic vegetation control permits to eliminate the requirement of posting a sign at the treatment area five days in advance of the treatment. Effective 30 days after filing with the Publisher.

312 IAC 9-10-3

SECTION 1. 312 IAC 9-10-3 IS AMENDED TO READ AS FOLLOWS:

312 IAC 9-10-3 Aquatic vegetation control permits

Authority: IC 14-22-2-6; IC 14-22-9-10

Affected: IC 14-22-9-10

Sec. 3. (a) Except as provided under IC 14-22-9-10(a), a person must obtain a permit under this section before seeking to control aquatic vegetation through:

- (1) chemical;
- (2) mechanical;
- (3) physical; or
- (4) biological;

means in waters of the state.

(b) As provided under IC 14-22-9-10(a), this section does not apply to a landowner or tenant of real property adjacent to public waters or boundary waters of the state when controlling aquatic vegetation in the immediate vicinity of a boat landing or bathing beach located on or adjacent to the real property of the landowner or tenant if the following conditions exist:

- (1) Aquatic vegetation is controlled in one (1) contiguous area that is:
 - (A) six hundred twenty-five (625) square feet or smaller;
 - (B) along the legally established, average, or normal shoreline for twenty-five (25) feet or less;
 - (C) where the water depth is six (6) feet or less.
- (2) Aquatic vegetation control efforts are repeated only within the same area in the same calendar year.
- (3) If the vegetation-free area already exists within the immediate vicinity of a boat landing or bathing beach on the real property of the landowner or tenant, any aquatic vegetation control efforts require a permit.

(c) Before obtaining a permit under this section, a person must complete an application on a departmental form that includes the following information:

- (1) The common name of the target plants and relative abundance of other dominant plants in each area to be controlled.
- (2) The acreage to be controlled, with affected areas illustrated on a legible map.
- (3) The maximum depth of the water, the maximum perpendicular distance from shoreline, and the linear distance along the shoreline where plants are to be treated.
- (4) The name and amount of the chemical to be used in each treatment, if a chemical control is used.
- (5) The duration and timing of control efforts, if controls will be repeated under a single permit.
- (6) The location of any water supply intake that may be adversely affected by the aquatic vegetation control activities.
- (7) The species, stocking rate, and release location, if a biological control is used.
- (8) The type of equipment and location of disposal area, if a mechanical control is used.
- (9) The name and contact information for the person who will conduct the control effort.
- (10) Any other information reasonably required by the department to effectively review the application.

(d) An applicant for a permit under this section must demonstrate each of the following to the satisfaction of the department:

- (1) The proposed treatment is likely to provide effective relief.
- (2) The proposed treatment will not result in any of the following:
 - (A) A hazard to humans, animals, or other nontarget organisms.
 - (B) A significant adverse impact to:
 - (i) the treated waterway;
 - (ii) endangered or threatened species; or
 - (iii) beneficial organisms within the treatment area or in adjacent areas, either directly or through habitat destruction.
 - (C) An unreasonable restriction on an existing use of the waterway.
- (3) The proposed treatment will not occur within one hundred fifty (150) feet perpendicular to the shoreline of a public freshwater lake, along an area classified as a significant wetland under 312 IAC 11-2-24, except where the applicant demonstrates the treatment can be conducted without reducing the ecological value of the area.
- (4) The following apply if a chemical is to be used for aquatic vegetation control:
 - (A) The chemical is labeled and registered for this purpose by the United States Environmental Protection Agency.
 - (B) Prior written approval is received from the department of environmental management if the waterway to be treated is a public drinking water supply.

(e) A permit issued under this section is limited to:

- (1) the terms of the application; and
- (2) conditions imposed on the permit by the department.

(f) Except as otherwise provided in this subsection, ~~five (5) days~~ before the application of a substance permitted under this section, the permit holder must post clearly visible signs at the treatment area indicating the substance that will be applied and what precautions should be taken. For a treatment to be performed on a reservoir for drinking water supply that is owned by a municipality, the posting required under this subsection may be provided no later than thirty-six (36) hours before the permitted activity.

(g) A permit holder must submit a report on a departmental form not later than the seven (7) days following the control effort, providing the date, location, acreage, and method used in each area where controls were implemented. (*Natural Resources Commission; 312 IAC 9-10-3; filed May 12, 1997, 10:00 a.m.: 20 IR 2728; readopted filed Jul 28, 2003, 12:00 p.m.: 27 IR 286; filed Nov 14, 2003, 5:30 p.m.: 27 IR 1165, eff Jan 1, 2004; readopted filed Nov 24, 2008, 11:08 a.m.: 20081210-IR-312080672RFA; filed Jul 6, 2010, 1:55 p.m.: 20100804-IR-312090616FRA*)